UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

TOM DEFOE, a minor by and through his parent and guardian, PHIL DEFOE, Plaintiffs, v. SID SPIVA, in his individual and official capacity as Principal of Anderson County Career and Technical School; MERL KRULL, in his individual and official capacity as Assistant Principal of Anderson County Vocational School; GREG DEAL, in his individual and official capacity as Principal of Anderson County High School; V. L. STONECIPHER, in his official capacity as Director of Schools for Anderson County; JOHN BURELL, in his official capacity as Chairman of the Anderson County School Board; and THE ANDERSON COUNTY SCHOOL BOARD, Defendants.	)	No.: 3:06-CV-450 (VARLAN/GUYTON)

MEMORANDUM AND ORDER

Plaintiffs Tom Defoe, a junior at Anderson County High School, and his father Phil Defoe, brought a § 1983 suit alleging that defendants, Anderson County school officials and the Anderson County School Board, are violating plaintiffs' First and Fourteenth Amendment rights by prohibiting Tom Defoe from wearing clothing depicting the confederate battle flag.

This civil action is before the Court on Plaintiffs' Motion and Memorandum of Points and Authorities in Support of Motion to Reconsider Motion for Summary Judgment [Doc. 72] and defendants' Motion for the Court to Reconsider Defendants Application for Summary Judgment [Doc. 112]. The Court has carefully considered the pending motions and responsive filings in light of the record as a whole and the applicable law. For the reasons set forth herein, both Plaintiffs' Motion and Memorandum of Points and Authorities in Support of Motion to Reconsider Motion for Summary Judgment [Doc. 72] and defendants' Motion for the Court to Reconsider Defendants Application for Summary Judgment [Doc. 112] will be denied.

I. Relevant Facts

At the time of the incidents giving rise to this case, Plaintiff Tom Defoe was a high school student who attended Anderson County High School and Anderson County Career and Technical Center. [Doc. 63 at 2.] All Anderson County schools have a dress code policy in effect which states in part:

> Clothing and accessories such as backpacks, patches, jewelry, and notebooks must not display (1) racial or ethnic slurs/symbols, (2) gang affiliations, (3) vulgar, subversive, or sexually suggestive language or images; nor, should they promote products which students may not legally buy; such as alcohol, tobacco, and illegal drugs.

[Doc. 63 at 7.]

On October 30, 2006, Tom Defoe wore a t-shirt to school bearing the image of the confederate battle flag. [Doc. 1 at ¶ 11; Doc. 14 at ¶ 12.] Anderson County High School officials informed Tom Defoe that his shirt violated the school's dress code policy, and he

was asked to remove the shirt or turn it inside out. [Doc. 1 at ¶ 11; Doc. 14 at ¶ 12.] Tom Defoe refused to comply. [Doc. 1 at ¶ 11; Doc. 14 at ¶ 12.] Plaintiffs assert that Tom Defoe was suspended in response to his refusal to comply, while defendants assert that he was merely sent home. [Doc. 1 at ¶ 11; Doc. 14 at ¶ 12.] On November 6, 2006, Tom Defoe wore a belt buckle depicting the confederate battle flag to school. [Doc. 1 at ¶ 12; Doc. 14 at ¶ 13.] Again, a school official informed Tom Defoe that his clothing violated the dress code policy and when Tom Defoe refused to comply with the dress code, he was suspended for insubordination. [Doc. 1 at ¶ 12; Doc. 14 at ¶ 13.] Prior to these two instances, Tom Defoe wore clothing depicting the confederate battle flag to school on several occasions but complied with requests to remove or cover the clothing. [Doc. 1 at ¶ 13; Doc. 14 at ¶ 14.]

Plaintiffs assert that there have been no disruptions to the learning environment caused by displays of the confederate flag and that school officials and teachers stated that it was unlikely that the confederate flag would cause a disruption at school. [Doc. 1 at ¶ 14; Doc. 50 at 6-7.] Defendants assert that there have been incidents of racial unrest, violence, and general disruption of school activities as a result of displays of the confederate battle flag. [Doc. 14 at ¶ 15.] Defendants cite testimony at the preliminary injunction hearing on January 30, 2007 describing racially-motivated incidents, at least one of which involved the confederate flag, in support of this assertion. [Doc. 63; *see also* Hr'g Tr., Jan. 30, 3007.] Plaintiffs assert Anderson County High School permits students to wear clothing bearing other expressions of political or controversial viewpoints, including images referring to Malcolm X, foreign national flags, and candidates for political office. [Doc. 1 at ¶ 15.]

Defendants deny that allegation. [Doc. 14 at ¶ 16.] Defendants plan to continue to enforce the dress code ban on displays of the confederate flag. [Doc. 1 at ¶ 17; Doc. 14 at ¶ 18.]

II. Standard of Review

Under Federal Rule of Civil Procedure 56(c), summary judgment is proper if "the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." The burden of establishing there is no genuine issue of material fact lies upon the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 n.2 (1986). The court must view the facts and all inferences to be drawn therefrom in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Burchett v. Kiefer*, 310 F.3d 937, 942 (6th Cir. 2002). To establish a genuine issue as to the existence of a particular element, the non-moving party must point to evidence in the record upon which a reasonable jury could find in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The genuine issue must also be material; that is, it must involve facts that might affect the outcome of the suit under the governing law. *Id.*

The judge's function at the point of summary judgment is limited to determining whether sufficient evidence has been presented to make the issue of fact a proper jury question, and not to weigh the evidence, judge the credibility of witnesses, and determine the truth of the matter. *Id.* at 249. Thus, "[t]he inquiry performed is the threshold inquiry of determining whether there is the need for trial – whether, in other words, there are any

genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 250.

III. Analysis

A. Free Speech

While students do not "shed their constitutional rights to the freedom of speech or expression at the schoolhouse gate," students' rights to free speech are limited. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). School officials may regulate student speech which causes a material and substantial disruption to the learning environment. *Id.* at 509. In applying *Tinker*, "[t]he Court must consider the content and context of the speech, and the nature of the school's response." *Lowery v. Euverard*, 497 F.3d 584, 588 (6th Cir. 2007). While defendants question whether *Tinker* applies post-*Morse v. Frederick*, 127 S. Ct. 2618 (2007), *Morse* addressed whether schools can regulate speech that advocates drug use, and did not alter *Tinker*'s application here. *See also Lowery*, 497 F.3d at 596 (applying *Tinker* analysis post-*Morse*).

School officials do not have to wait for an actual disturbance to occur before they may regulate speech. *Tinker* does not require certainty that a disruption will occur, only a reasonable forecast of a substantial disruption. *Lowery*, 497 at 592 (quoting *Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755, 767 (9th Cir. 2006). Regulation of speech is permissible if "it was reasonable for school officials 'to forecast a substantial disruption of or material interference with school activities.'" *Lowery*, 497 F.3d at 592 (citation omitted). In a similar case, the Sixth Circuit held that the school does not have to wait for a disruption

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